In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 307

GLORIA JEAN NEPSTEAD AND JOHN EDWARD ASH,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On August 22, 1968, federal narcotics agents executed a search warrant obtained six days earlier for a house in San Francisco. The agents, pursuant to the authority granted by the warrant, seized laboratory equipment and chemicals used to manufacture LSD; they also arrested three persons found on the premises at the time of the search, including petitioner Nepstead. Subsequently, Nepstead and petitioner Ash were indicted for conspiracy to manufacture LSD, manufacture of that drug, and failing to register their manufacturing establishment with the Secretary of Health, Education, and Welfare, in violation of 18 U.S.C. 371 and 21 U.S.C. 331(q)(1),

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360(b), 331(p). Petitioners moved prior to trial to suppress the evidence seized, arguing that the agents had not complied with the "forthwith" requirement of Rule 41(c), F. R. Crim. P., regarding the time within which search warrants must be executed. The district court granted the motion. The United States appealed under 18 U.S.C. (Supp. V) 3731; the court of appeals reversed (Pet. App.) and thereafter denied a petition for rehearing *en banc on* May 8, 1970. The petition for a writ of certiorari was not filed until June 22, 1970, and is thus out of time under Rule 22(2) of the Rules of this Court.

Petitioners maintain that there is a conflict among the circuits relating to whether a search warrant is always valid if executed within the ten-day maximum period prescribed by Rule 41(d), F. R. Crim. P. They construe the court of appeals' decision below as adopting a *per se* rule that it is, and claim this is in conflict with holdings in the Eighth, Seventh, and District of Columbia Circuits. The court below, however, did not purport to hold that a search warrant would always be valid if executed within ten days. Rather, it stated (Pet. App. 3):

> Hence, we adopt the view of every court that has been directly presented with the problem and hold that the ten-day period merely sets the maximum under the Rule, and the requirement of execution "forthwith," depending on the circumstances of each case, may require execution in something less than ten days.

The court then went on to analyze the circumstances of the instant case, finding that nothing had taken place within the six-day period between issuance and execution of the warrant to alter the facts upon which the original affidavit was based (Pet. App. 4–5). The result reached by the court of appeals was proper and was not predicated upon any principle as to which a conflict in the circuits exists. This Court recently denied certiorari in two cases presenting identical claims. *United States* v. *Dunning*, No. 32527, C.A. 2, decided November 17, 1969, certiorari denied, 397 U.S. 1002 (No. 1583 Misc., 1969 Term)[1]; *House v. United States*, 411 F. 2d 725 (C.A.D.C.), certiorari denied, June 22, 1970 (No. 2151 Misc., 1969 Term).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

EDWIN N. GRISWOLD,
Solicitor General.

JULY 1970.

[1] Indeed, the court below relied extensively on the court of appeals' decision in the *Dunnings* case in reaching its result. See Pet. App. 4, where the court stated: "We adopt the reasoning of the Second Circuit in *Dunnings* to the effect that 'forthwith' means any time within 10 days after the warrant is issued, provided that the probable cause recited in the affidavit continues until the time of execution, giving consideration to the intervening knowledge of the officers and the passage of time. Such a rule does not do violence to either objective behind Rule 41 (c) and (d) because the officers are given reasonable latitude in executing the warrant and the person with standing to suppress the evidence seized is assured that the search is not made on something less than probable cause."